

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN JAMES WILSON, No. C-92-3181 TEH (PR)
Petitioner, ORDER TO SHOW CAUSE
v.
CHARLES D. MARSHALL, Warden,
Respondent.

In 1992, Petitioner filed a prisoner complaint which the Court construed as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Doc. #2. The Court dismissed the complaint with leave to amend and file a first amended petition for a writ of habeas corpus within 30 days. Id. Petitioner obtained an extension of time to file an amended petition by no later than October 26, 1992. Doc. #4. On October 30, 1992, the Court noted that Petitioner had not filed an amended petition within the designated time and dismissed the case without prejudice. Doc. #5. On December 15, 1992, after the case was closed, Petitioner filed a first amended petition. Doc. #7.

1 However, it appears that the Court received a letter from
2 Petitioner on November 8, 1992, which was not docketed in the
3 above-captioned case. In response to that letter, on November 18,
4 1992, the Court informed Petitioner that no amended petition had
5 been received and ordered Petitioner to file an amended petition by
6 December 18, 1992. The Court's November 18, 1992 letter was not
7 docketed in the above-captioned case. Accordingly, when the amended
8 petition was filed on December 15, 1992, no action was taken since
9 the case had been closed on October 30, 1992.

10 More than ten years later, on January 12, 2005, Petitioner
11 requested that the Court take action on the first amended petition.
12 Doc. #10. He claimed that the amended petition was timely filed
13 pursuant to the extension of time he received from the Court in the
14 Court's letter dated November 18, 1992. The Court denied
15 Petitioner's request for action on his first amended petition
16 without addressing whether the amended petition was timely filed.
17 The Court instead noted that Petitioner had stated in the body of
18 his habeas petition that the grounds for relief raised therein "were
19 never previously presented" to the state courts. Accordingly, on
20 July 27, 2005, the Court dismissed the petition without prejudice to
21 refiling after state judicial remedies are exhausted. Doc. #12.

22 Over four years after that order of dismissal, Petitioner
23 has filed a request to reopen this case, stating that he has
24 exhausted his state court remedies. Doc. #13. According to
25 Petitioner's motion to reopen, the California Supreme Court denied
26 his habeas petition on June 14, 2006. Petitioner's request to
27

1 reopen the case was filed four years after he exhausted his state
2 remedies.

3 The Court finds that Petitioner's first amended petition
4 was timely filed and GRANTS Petitioner's request to re-open this
5 case.

6 I

7 This Court may entertain a petition for a writ of habeas
8 corpus "in behalf of a person in custody pursuant to the judgment of
9 a State court only on the ground that he is in custody in violation
10 of the Constitution or laws or treaties of the United States." 28
11 U.S.C. § 2254(a). It shall "award the writ or issue an order
12 directing the respondent to show cause why the writ should not be
13 granted, unless it appears from the application that the applicant
14 or person detained is not entitled thereto." Id. § 2243.

15 Petitioner seeks federal habeas corpus relief by alleging
16 that his sentence (1) constituted cruel and unusual punishment in
17 violation of the Eighth Amendment and violated the Ex Post Facto
18 Clause; (2) violated his right to equal protection; and (3) violated
19 his due process rights. Liberally construed, Petitioner's claims
20 appear cognizable under 28 U.S.C. § 2254 and merit an Answer from
21 Respondent. See Zichko v. Idaho, 247 F.3d 1015, 1020 (9th Cir.
22 2001) (federal courts must construe pro se petitions for writs of
23 habeas corpus liberally).

24 The proper respondent in this action is Greg Lewis, the
25 current Warden at Pelican Bay State Prison, where petitioner is
26 incarcerated, rather than the originally-named respondent, Charles
27

1 D. Marshall, the former Warden at Pelican Bay State Prison. See
2 Fed. R. Civ. P. 25(d). Failure to name the proper custodian, which
3 here is Warden Lewis, the sole person who can produce "the body" of
4 the petitioner at this time, deprives federal courts of personal
5 jurisdiction. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 896 (9th Cir.
6 1996). Accordingly, the Clerk shall substitute Greg Lewis as the
7 respondent in this action.

8 II

9 For the foregoing reasons and for good cause shown,

10 1. The Clerk is directed to re-open this case and to
11 serve by certified mail a copy of this Order and the first amended
12 Petition, and all attachments thereto (i.e., Doc. #7), on Respondent
13 and Respondent's attorney, the Attorney General of the State of
14 California. The Clerk also shall serve a copy of this Order on
15 Petitioner.

16 2. Respondent shall file with the Court and serve on
17 Petitioner, within sixty (60) days of the issuance of this Order, an
18 Answer conforming in all respects to Rule 5 of the Rules Governing
19 Section 2254 Cases, showing cause why a writ of habeas corpus should
20 not be granted. Respondent shall file with the Answer and serve on
21 Petitioner a copy of all portions of the state trial record that
22 have been transcribed previously and that are relevant to a
23 determination of the issues presented by the Petition.

24 If Petitioner wishes to respond to the Answer, he shall do
25 so by filing a Traverse with the Court and serving it on Respondent
26 within thirty (30) days of his receipt of the Answer.

1 3. In lieu of an Answer, Respondent may file a Motion to
2 Dismiss on procedural grounds, as set forth in the Advisory
3 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases.
4 If Respondent files such a motion, Petitioner shall file with the
5 Court and serve on Respondent an Opposition or Statement of
6 Non-Opposition within thirty (30) days of receipt of the motion, and
7 Respondent shall file with the Court and serve on Petitioner a Reply
8 within fifteen (15) days of receipt of any Opposition.

9 4. Petitioner is reminded that all communications with
10 the Court must be served on Respondent by mailing a true copy of the
11 document to Respondent's counsel. Petitioner also must keep the
12 Court and all parties informed of any change of address.

13 IT IS SO ORDERED.

14
15 DATED 04/16/2012


16

17 THELTON E. HENDERSON
18 United States District Judge

19
20 G:\PRO-SE\TEH\OLD FILES\Wilson-92-3181 reopen1.wpd
21
22
23
24
25
26
27
28